Supreme Court, U.S.
FILED
MAR 2 - 2005
OFFICE OF THE CLERK

No. 04-885

In The Supreme Court Of The United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,
Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for Wallace's Bookstores, Inc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF OHIO AND 48 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 48 other States have a critical interest in this case, as it implicates one of the most controversial and publicly-debated legal issues of recent years—the power of Congress to abrogate the States' Eleventh Amendment immunity. The issue is presented here in an area vital to a State's ability to control its fisc: bankruptcy.

The States of Ohio, Michigan, Tennessee and Kentucky plainly have a strong interest in the resolution of the case, as they are within the jurisdiction of the Sixth Circuit. But the other *amici* States also have a strong interest in the case because—unlike in other fields of federal jurisprudence—it is common for States to be involved in bankruptcies in Circuits other than their own. For instance, in 2004, the Missouri Department of Revenue, Bankruptcy Unit, opened 5,878 cases, of which 389 or 15% were out-of-state cases. Connecticut had an interest in approximately 300 out-of-state bankruptcy cases in 2004. And of Washington's open bankruptcy cases for 2004, almost 12% were in circuits other than the Ninth.

The possibility of being haled into bankruptcy court across the United States gives the States a strong interest in ensuring that the constitutional requirement of "uniform Laws on the subject of Bankruptcies throughout the United States" is met. U.S. Const., Art. I, § 8. The current split among the circuits on the issue of sovereign immunity exposes the States to varying treatment depending on the circuit in which the bankruptcy proceeds, thereby frustrating clear constitutional intent.

Indeed, this case provides the perfect example of lack of uniformity. Virginia was sued in Kentucky, where Sixth

Circuit precedent holds that Congress successfully abrogated Virginia's sovereign immunity in bankruptcy. In contrast, if Virginia had been sued in Virginia, it would have enjoyed sovereign immunity under Fourth Circuit precedent, which holds that Congress did not successfully abrogate the States' immunity in bankruptcy.

In short, because the States have no control over a debtor's choice of forum, this case could have a significant impact on the public fisc of all the States, not just those in the Sixth Circuit. *Amici* States therefore urge this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

The petition should be granted for at least three reasons. First, there is a conflict between the Sixth Circuit and six other circuits. Moreover, it is a particularly harmful conflict because a State is often haled into bankruptcy court outside its home circuit. The split thereby frustrates clear constitutional demand for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. Second, this case permits the Court to reach and resolve the abrogation issue it left open in *Tennessee Student Assistance Corp. v. Hood*, 124 S.Ct. 1905 (2004) (*Hood II*). The Sixth Circuit ignores the entire body of recent case law, as well as the intent of the Founders, on the issue of Eleventh Amendment immunity of the States and the power of Congress to abrogate Eleventh Amendment immunity in the area of bankruptcy. Finally, resolution of the abrogation issue is a necessary predicate to the resolution of additional bankruptcy issues of great importance to the States, including the scope of a proof-of-claim waiver of sovereign immunity.

I. The Circuits Are Split on the Question Presented.

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court made clear that Congress lacks power to abrogate a State's sovereign immunity by passing legislation under Article I. As detailed in section II, below, the Court has reiterated this principle numerous times since *Seminole Tribe*. However, Congress had attempted an express abrogation under its Article I powers in the 1994 amendments to the Bankruptcy Code. 11 U.S.C. § 106(a).

The Third, Fourth, Fifth, Seventh, Ninth and Eleventh circuits have held that § 106(a) is unconstitutional because—for purposes of Eleventh Amendment immunity—no principled difference exists between the Bankruptcy Clause and other Article I clauses. *Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*, 2004 U.S. App. LEXIS 26872; *Nelson v. Lacrosse Co. Dist. Atty. (In re Nelson)*, 301 F.3d 820 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pa. (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 245 (3d Cir. 1998); *Dept. of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 246 (5th Cir. 1997); *Schlossberg v. Md. (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997). Of particular interest is *Crow*, in which the Eleventh Circuit distinguished *Hood II* and held that in *in personam* actions—as opposed to the *in rem* discharge proceedings at issue in *Hood*—Congress has not successfully abrogated the States' sovereign immunity. *Crow* at *16.

However, the Sixth Circuit in *Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755 (6th Cir 2003) (*Hood I*), held that the States lacked any sovereign immunity in the bankruptcy context—a radical departure

from the other circuits to have considered the issue. Because the Court did not reach the abrogation issue in resolving *Hood II*, *Hood I* remains binding precedent in the Sixth Circuit. Indeed, it was applied in the case below. *Hood I* held that the States ceded their sovereign *immunity* in bankruptcy court, as well as their sovereign *authority* over the area of bankruptcy in the plan of the Constitutional Convention. The *Hood I* Court thus concluded that Congress had the power to abrogate—and did abrogate—the States' immunity in enacting 11 U.S.C. § 106(a). In doing so, the Sixth Circuit created a clear conflict with all other circuits that have reached the issue.

The importance of resolving this conflict now is demonstrated by the frequency with which it arises. Six circuits have already weighed in. Of the remaining five, three have faced it, although they ultimately resolved the case on other grounds. For example, the First Circuit has at least twice been presented with—but not reached—the abrogation issue. *Gosselin v. IRS* (*In re Gosselin*), 276 F.3d 70 (1st Cir. 2002) (dismissal affirmed on other grounds); *Arecibo Community Health Care, Inc. v. Puerto Rico Dept. of Health* (*In re Arecibo Community Health Care*), 270 F.3d 17 (1st Cir. 2001) (dismissed on waiver). The Eighth and Tenth Circuits have similarly encountered but avoided the abrogation issue by holding that the State had waived its immunity. *Rose v. Missouri Student Loan Program* (*In re Rose*), 187 F.3d 926 (8th Cir. 1999) (*but see May v. Missouri Dept. of Revenue* (*In re May*), 2 Fed. Appx. 681 (8th Cir. 2001) (implying immunity)); *Straight v. Wyoming DOT* (*In re Straight*), 143 F.3d 1387 (10th Cir. 1998). In addition, since the Court decided *Hood II*, the Eleventh Circuit has faced and resolved the issue in *Crow*. In short, this issue will not go away.

Moreover, the various circuit cases have considered all arguments pertinent to the issue. The arguments considered in the Eleventh Circuit in *Crow* last month are virtually the same as those considered by the Fourth and Fifth Circuits in *Schlossberg* and *Fernandez* immediately after *Seminole Tribe* was decided. The issue is ripe for consideration by the Court.

Given the importance of bankruptcy to both States and individuals, and this Court's recent holdings on the Eleventh Amendment, the conflict in the circuits on this recurring issue is alone sufficient reason for the Court to grant certiorari.

Moreover, the division and confusion on this issue is particularly harmful to the States because it is far more likely than in other areas of the law that a State will find itself haled into bankruptcy court outside its home circuit. Indeed, this case provides the perfect example. Virginia was sued in Kentucky, where Sixth Circuit precedent—set in *Hood I* and followed in this case—holds that Congress successfully abrogated Virginia's sovereign immunity in bankruptcy. If not reversed, Virginia will have to litigate its case on the merits. In contrast, if Virginia had been sued at home, where Fourth Circuit precedent—set in *Schlossberg*—holds that Congress did not successfully abrogate the States' immunity in bankruptcy, Virginia would have enjoyed full sovereign immunity and been free of litigation. Thus, the conflict of authority prevents a State from effectively planning and guiding its actions based on the law of its own circuit—which the States do in most other areas of federal law.

In addition, of course, debtors now know that they have a "free pass" in the Sixth Circuit—they can file adversary proceedings against a State without having to worry about immunity. Debtors with substantial claims

against a State will therefore have a strong motive to file for bankruptcy in a Sixth Circuit State if they can. The chances of bankruptcy litigation in a Sixth Circuit court are therefore increased for every State.

Finally, conflict in the circuits and lower courts is particularly harmful in the bankruptcy context because of the constitutional requirement for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. "The constitutional requirement of uniformity is a requirement of geographic uniformity." *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring). If the Eleventh Amendment protects state immunity in some circuits and not in others, the Bankruptcy Code will no longer be geographically uniform, and clear constitutional intent will be frustrated.

The Court should grant certiorari to resolve the conflict among the circuits about Congress's power to abrogate Eleventh Amendment immunity in the Bankruptcy Code.

II. This Case Squarely Presents the Issue of Congress' Power to Abrogate Eleventh Amendment Immunity in the Bankruptcy Context.

In case after case, the Court has repeatedly affirmed that Congress cannot use its Article I powers to override the States' Eleventh Amendment immunity. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 72-73. "Congress may not abrogate state sovereign immunity pursuant to its Article I powers, hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." *Florida Prepaid*

Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 636 (1999). "[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court." *Alden v. Maine*, 527 U.S. 706 (1999). "Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *Board of Trustees v. Garrett*, 531 U.S. 356, 364 (2001). *See also City of Boerne v. Flores*, 521 U.S. 507 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79 (2000).

Rather, Congress can abrogate the States' Eleventh Amendment immunity only through an exercise of its Fourteenth Amendment powers to "remedy and deter a violation of a constitutional right." *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001). *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Seminole Tribe*, 517 U.S. at 59; *City of Boerne*, 521 U.S. at 516-53; *Kimel*, 528 U.S. at 80; *Alden*, 527 U.S. at 756, *Florida Prepaid*, 527 U.S. at 637.

Despite the many recent cases addressing the boundaries of State sovereign immunity, the Court has not had the opportunity to consider that issue in the bankruptcy context. Before last Term, the closest it came was *In the Matter of Merchant's Grain, Inc.*, No. 95-561, a case before the Court on a petition for certiorari from the Seventh Circuit the same year as *Seminole Tribe*. After ruling in *Seminole Tribe*, however, the Court granted the State of Ohio's petition, vacated the decision below and remanded for

consideration in light of *Seminole Tribe*. 517 U.S. 1130. On remand, the sovereign immunity issue was mooted.

Last Term the Court granted certiorari in *Tennessee Student Assistance Corp. v. Hood*, 124 S.Ct. 1905 (2004) (*Hood II*), to resolve the abrogation issue in the bankruptcy context. However, because *Hood II* dealt with the discharge of student-loan debt, the Court resolved the case based on *in rem* jurisdiction, rather than on an analysis of Congress' power to abrogate sovereign immunity in bankruptcy. 124 S.Ct. at 1910-12.

In contrast, this case deals with an *in personam* proceeding, in which the liquidator has sued state entities to recover alleged preferential transfers. Respondent Katz thus "seeks affirmative relief from the [S]tate through a coercive judicial process." *Crow* at *4. The bankruptcy court's jurisdiction is therefore "premised on the persona of the [S]tate, not on the res of the debtor's property." *Id.*

Therefore, the issue for which the Court granted review but could not reach in *Hood II* is squarely presented here, in the context of *in personam* rather than *in rem* jurisdiction. The Court should embrace this opportunity and grant certiorari to resolve the issue left open in *Hood II*.

The need is particularly pressing because, despite overwhelming precedent from this Court and guidance from its sister circuits, the Sixth Circuit decision in *Hood I* adopted an obsolete and discredited theory of sovereign immunity. It held that Congress can abrogate a State's sovereign immunity from suit simply by passing legislation under Article I because the States ceded their sovereign immunity in the plan of the Constitutional Convention. This idea is nothing new—it was the rationale behind the now-defunct plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1

(1988), which this Court expressly overruled in *Seminole Tribe*.

Moreover, the early history of the Constitution and of bankruptcy laws, together with more recent case law, demonstrates that Congress's power to abrogate immunity in bankruptcy court is no more potent than it is with regard to other Article I powers. Indeed, the scope of Congress' bankruptcy powers is, in some ways, more limited than its powers under other Article I provisions. Congress' power under the Commerce Clause, for instance, is so broad that it preempts States from even legislating within its sphere—the so-called "dormant commerce clause" doctrine. In the bankruptcy context, by contrast, States are allowed to pass—and have passed—insolvency laws in the absence of federal bankruptcy coverage. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

Nor, as some courts have suggested, does the constitutional requirement of uniformity provide any greater authority for Congress to abrogate. First, the uniformity requirement is primarily geographic in nature—the laws must be uniform throughout the United States—and therefore does not present difficulties in treatment between States and private persons. *Vanston Bondholders*, 329 U.S. at 172. Second, neither the comprehensiveness of a federal power nor a legitimate desire for uniformity in a scheme of federal law can overcome the States' sovereign immunity. *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 767 (2002); *Florida Prepaid*, 527 U.S. at 647-48.

Similarly, Congress cannot circumvent the limitations placed on Article III courts by creating Article I bankruptcy courts. *See Federal Maritime Commission*, 535 U.S. at 756-767.

Nor can Congress abrogate state sovereign immunity by attempting to repackage its exercise of Article I bankruptcy power as an exercise of its Fourteenth Amendment power. Congress's authority to legislate, and therefore its ability to abrogate, under the Fourteenth Amendment is limited to situations where it is protecting an individual's constitutional right from State intrusion. *College Savings Bank*, 527 U.S. at 672; *City of Boerne*, 521 U.S. at 516-520. There is, however, no constitutional right to a discharge in bankruptcy. *United States v. Kras*, 409 U.S. 434 (1973). Therefore, even if Congress had purported to rely on its authority under the Fourteenth Amendment in enacting 11 U.S.C. § 106(a)—and it did not—that would still provide no basis for Congress to abrogate State sovereign immunity.

In short, "there is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses." *In re Sacred Heart Hospital of Norristown*, 133 F.3d at 243. The Court should grant certiorari and reverse.

III. Resolving This Issue is Necessary to Resolving Other Bankruptcy Issues of Importance to the States.

The *amici* States also urge the Court to grant certiorari in this case because the issue here must be resolved as a necessary predicate to the resolution of other critical and controversial issues regarding the interaction of bankruptcy and sovereign immunity.

For example, the Court held in *Gardner v. New Jersey* that filing a proof of claim waives a State's sovereign immunity in bankruptcy court. 329 U.S. 565 (1947). But the *scope* of a proof-of-claim waiver is still a matter of controversy—does the waiver extend only to the amount of

the proof of claim, or does it allow a positive recovery against the State?

The *amici* States clearly have a strong interest in the proof-of-claim issue. Both planning and litigation decisions aimed at protecting the State's fisc are compromised as long as it is unclear whether a proof of claim puts a State at risk only for the amount of the claim, or for the entire contents of the State's coffers. In addition to the importance of resolving the precise issue presented here, the Court should grant certiorari to pave the way for resolution of other important issues in future cases.

CONCLUSION

For the foregoing reasons, *amici* States of Ohio and 48 other States respectfully request the Court grant the writ of certiorari.

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